

**UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE**

Office of Business Liaison

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Temporary Alien Labor to Meet Temporary Needs

ABOUT THE H-2 CATEGORY

Agricultural (H-2a) and Non-agricultural (H-2b) Temporary Labor

United States (US) employers may petition for skilled or unskilled foreign workers to meet temporary¹ or seasonal² needs in positions for which qualified US workers³ are not available. The H-2 nonimmigrant classifications include **H-2a** for agricultural workers and **H-2b** for non-agricultural workers.

IMPORTANT! Both the services for which the employer requests H-2 labor approval and the employer's need for such services must be temporary. Petitions of employers determined to have an ongoing or continuing need for the H-2 services sought will be denied. This classification will not permit an alien to be placed temporarily in a permanent US job.

Annual quota There is an annual cap of 66,000 visas available for H-2B workers. There is no annual cap on visas for H-2A workers.

Blanket petitions A single petition may cover an unlimited number of workers as long as they will perform the same services, work in the same location, and, in most cases, come from places that are served by the same US consulate. It is not necessary to identify requested **H-2A** beneficiaries by name (unless only a single worker is needed) if they are unnamed on the underlying labor certification. **H-2B** beneficiaries must be named unless circumstances (e.g. emergencies) make identification by name impossible. The number of unnamed beneficiaries must always be stated on the petition.

Substitution of beneficiaries In cases involving unnamed beneficiaries, or where the temporary services needed require no training or experience, beneficiaries may be substituted after the petition is approved as long as they meet criteria set forth in the labor certification and petition.

Duration of stay and extensions Approved H-2 petitions will specify a period of employment, not to exceed one year, that matches the employer's stated need. Extensions can be granted in increments of up to one year, each requiring a new labor certification and INS petition, but the maximum stay cannot exceed three years. Any alien who has held H-2 status for three years is barred from H-2a or other classification for agricultural labor until he/she has remained outside of the United States (US) for an uninterrupted period of six months.

Dual Intent Unlike H-1B workers, H-2A and H-2B workers may **not** have the dual intent of working temporarily under a petition for nonimmigrant services and applying for employment-based permanent residence status.

Dependents Family members of H-2a or H-2b principals, if admitted under the H-4 classification, may not be employed in the US.

¹ A job is temporary when the employer's need to fill the job will last no longer than one year.

² A job is seasonal when it is tied to a certain time of the year by an event or pattern, such as a growing cycle, and requires labor levels above what is necessary for ongoing operations.

³ Qualified US workers include work authorized aliens.

H-2A AGRICULTURAL LABOR

Employers may meet temporary or seasonal needs for agricultural labor by petitioning for H-2A classification for one or more alien beneficiaries to work for a specified temporary time period. Successful petitions for H-2A workers will have demonstrated **both** of the following:

- Employment of the temporary alien workers will not adversely affect wages or working conditions of similarly employed workers in the US. Offered wages and conditions are comparable to standard wages and conditions in the geographical area where services will be performed.
- Domestic work-authorized individuals who are willing, able and qualified to perform the needed services are not available when, where, or in the numbers needed.⁴

Association petitioners An association of employers with similar needs (e.g. citrus growers) may itself file a petition and be permitted to transfer the H-2A workers among any of its member employers that have stipulated to the conditions of H-2A eligibility in an attachment to the INS petition. The association may also petition as a joint employer with its members. Where they share supervision or control of workers, the association and employer members also share compliance responsibilities and liabilities.

Housing requirement Employers must arrange for housing of nonimmigrant temporary agricultural workers. They may choose to furnish housing that meets Federal standards for temporary labor camps or, if applicable, secure housing that meets state/local standards for rental, public, or other substantially similar class of habitation.

H-2B NON-AGRICULTURAL LABOR (skilled or unskilled)

Employers may fill temporary needs for skilled or unskilled non-agricultural labor by petitioning for H-2B classification for one or more alien individuals to work for a specified temporary time period.⁵ Successful petitions for H-2B workers will have demonstrated **both** of the following:

- The proposed employment of the foreign worker will not displace a US worker or affect working conditions of similarly employed US workers.
- The sponsor's need for the skills to be provided by the alien worker is temporary.

What is a temporary need? Examples of temporary needs are **one-time-only needs** (e.g. special projects), **peak load situations** (i.e. need for given services is continual but the required level of staffing varies), **seasonal needs** (e.g. resort help), and **intermittent needs** (e.g. entertainers who don't meet the standards for O or P classification).

Termination A sponsoring employer who dismisses an H-2B worker prior to the end of the period of authorized stay is responsible for paying the reasonable costs of return transportation to the alien's last place of foreign residence.

Employment agencies Employment agencies do not qualify as H-2b petitioners to fill the temporary needs of their clients. This is because they are considered to have a permanent (ongoing) need for temporary services **themselves** even though the needs of their individual clients may be temporary.

⁴ It is necessary to demonstrate that solicitation of domestic workers to perform the needed services at the same wages, benefits and other conditions has failed. An ongoing recruitment plan is required to show that domestic workers will continue to be solicited, even after the labor certification is approved, until approved H-2A workers have departed for the US worksite and that domestic workers who respond to the job file maintained at the state employment office will be entitled to replace H-2A workers up until 50% of the required work has been completed (small employers needing fewer than 500 man-days of temporary labor per year and/or do not belong to associations that seek temporary labor for their members are not subject to the 50% rule).

⁵ This category cannot be used to procure medical services of foreign medical graduates, even if need for the services is temporary

H-2 PROCEDURES

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| <p>H-2A</p> <p><u>Agricultural Labor</u></p> <p>STEP 1</p> <p>US Department of Labor, Employment and Training Administration</p> <p>Application for certification consists of Form ETA 750, Part A, and Form ETA 790, the description of needed services and services required to be provided by the employer (wages, transportation, food, housing etc.) Duplicate applications must be submitted to the appropriate regional Department of Labor Employment and Training Administration office and the local state employment services office.</p> <p>STEP 2</p> <p>US Department of Justice, Immigration and Naturalization Service (INS)</p> <p>Form I-129, with the H supplement, is filed at the INS Service Center with jurisdiction over the place where the needed services will be performed. The approved Labor Certification (or denial of appeal, to which the INS will give deference in making the final decision that qualified domestic labor is unavailable) must be included. The petition may cover the same number of workers covered in the accompanying Labor Certification. Association petitioners must file attachment to petition showing that all employer members to whom H-2A workers may be transferred agree to the H-2A conditions. When the beneficiary is already present in the US in nonimmigrant status, application for change of status to the H-2B category is also filed on INS Form I-129 (step 3 is avoided in such cases).</p> <p>STEP 3</p> <p>US Department of State, foreign consular offices</p> <p>Application (including I-797B INS approval notice) for a visa to enter the US is filed on State Department Form OF 156. The temporary workers will be interviewed and must satisfy consular officers that they intend to depart the US after the approved temporary period and that they will maintain their residences and other ties abroad during that period.</p> | <p>H-2B</p> <p><u>Skilled/Unskilled Nonagricultural Labor</u></p> <p>STEP 1</p> <p>US Department of Labor, Employment and Training Administration</p> <p>Application for certification is made on Labor Department Form ETA 750, Part A, to the appropriate state employment services office.</p> <p>STEP 2</p> <p>US Department of Justice, Immigration and Naturalization Service (INS)</p> <p>The procedure is the same as for H-2A workers, except that where a labor certification has been denied, countervailing evidence addressing the reason(s) why the Labor Department would not issue the certification may be submitted with the Form I-129 and H Supplement.</p> <p>STEP 3</p> <p>US Department of State, foreign consular offices</p> <p>Same as H-2A, except that it is common for the tear-off portion of the Form I-797B to be used as a basis for a consulate to issue a visa even if the consulate has not received notification directly from the INS.</p> |
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GENERAL REQUIREMENTS FOR TEMPORARY LABOR CERTIFICATION

- Nature of employer's need for the work to be done must be temporary and the alien must be coming to the US for a temporary period (typically one year or less).
- An H-2B Labor Certification may not exceed one year, but may be extended in increments of one year or less (under extraordinary circumstances for a maximum period of three years).
- The Labor Certification Form ETA-750 must be filed by a US employer (or the employer's representative) who has a location to which US workers can be referred.
- Multiple openings may be included in one application if the aliens will be doing the same job. Different jobs require separate applications.
- Procedures require that the employer submit applications within 45 days of the date the employer needs the alien workers, not more than 120 days in advance of need.
- The Department of Labor (DOL) certification or denial in an H-2B case is advisory to INS. Even if DOL denies a labor certification, INS can approve an H-2B petition. Such decisions by INS are rare.

General Administrative Letter (GAL) 5-84: PROCESSING PROCEDURES FOR H-2b ENTERTAINERS

- Application submitted to one of three State Employment Services Offices Specializing in Entertainers: New York, Sacramento, or Austin.
- State reviews application for completeness and determines prevailing wage.
- Employer must advertise job opportunity in a national publication and provide recruitment report to State.
- State writes to appropriate national union(s) for availability information and prevailing wage confirmation.
- State sends application to DOL Certifying Officer for determination.
- Certifying Officer makes determination. If denied, the employer can appeal to INS (no appeal within DOL). DOL's determination is advisory to INS.

STANDARDS FOR DETERMINING TEMPORARY NATURE OF JOB OFFER

- Determination of the temporary nature of a job opportunity is not determined solely by the period of employment (which employer enters in item 18 of Form ETA750 Part A). The temporary requirement applies to **both** the stay of the alien and the nature of the job.
- INS and DOL definitions of temporary require that the employer's need for the services or labor shall be either: (1) a one-time occurrence (2) a seasonal need (3) a peak load need or (4) an intermittent need.

One-time occurrence Employer must establish that it has not employed workers to perform the services or labor at issue in the past and will not need workers to perform said services or labor in the future.

Alternatively, employer must establish that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. Examples might include an employer with an unexpectedly large, one-time, contract to furnish a product/service above its current capacity or a job that is permanent in nature, but whose incumbent will be incapacitated for an extended period of time.

Seasonal Need Employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature, including the period(s) of time during each year that in which it does not need the additional services or labor. Employment is not seasonal if the period during which the services or labor is needed is unpredictable, subject to change, or considered vacation for permanent employees.

Peakload Need Employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand with temporary employees who will not become a part of the regular operation (this overlaps to some extent with one-time and seasonal categories).

Intermittent Need Employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs workers for short periods.

FILING REQUIREMENTS

- An original and one copy of Part A of the Application for Alien Employment Certification signed by the employer. Part B is not required.
- Application with request for one or more alien worker.
- Documentation of employer's efforts to recruit US workers.
- Statement explaining why the job opportunity is temporary.
- Application and supporting documentation must be submitted to the SESA at least 45 (not more than 120 except with special permission of Certifying Officer) days before the date of need.
- Under extraordinary circumstances where H-2B workers are needed for more than 12 months, **a new application must be filed**. A particular job will never be certified for more than three continuous years.

PROCESSING

- SESA reviews application for completeness and conformity to DOL requirements.
- SESA determines prevailing wage.
- SESA places a ten day job order; if qualified U.S. applicants are on file.
- Employer places a three day advertisement including employer's name. Applicants should be directed to respond to the SESA for referral to the employer.
- Employer shall document that union and other recruitment sources, appropriate, and customary, were unable to refer qualified U.S. Workers.
- Employer must furnish SESA a post-application recruitment report. Report must contain identification of each recruitment source by name, information on each US worker that applied, and lawful job-related reasons for rejecting each applicant.
- SESA sends application, results of recruitment, prevailing wage findings, and any other information it deems appropriate to the Regional Certifying Officer.

DETERMINATION BY CERTIFYING OFFICER

Determination is based on availability, adverse effect on wages and working conditions, compliance with the prescribed procedures, and whether job opportunity contains recruitment or conditions which preclude consideration of U.S. Workers or which otherwise prevent their effective recruitment. Examples include:

- Job is permanent
- Job requirements are unduly restrictive
- Job is vacant because of strike or lockout
- Wage or salary not to be paid
- Location does not exist to which US applicants can be referred.

Denial: If application is denied, the notice sent to the employer must:

- Detail reasons why certification cannot be made
- Address availability and the prevailing wages/working conditions of US workers in the occupation
- Inform employer of right to appeal to INS or file a new application

Approval: If certification is granted, the notice sent to the employer must include:

- Certified application containing the temporary labor certification stamp. (**Note:** Beginning date of certified employment cannot be earlier than the date certification was granted.)
- Supporting documents.
- Completed Temporary Determination Form directing employer to submit all documents in support of petition to appropriate INS office.

APPLICATIONS REQUIRING SPECIAL PROCESSING

- Applications for aerospace engineers require certain additional documentation from employer.
- Applications for ten or more construction workers in the same occupation, for the same employer, at any one location or within a six month period are, in addition to normal processing, referred by Certifying Officer to AFL-CIO Human Resources Development Institute for possible recruitment at the local union.
- Applications for machinists and aerospace workers, in addition to normal processing, require Certifying Officer to contact Executive Director of International Association of Machinists and Aerospace Workers.
- Applications for boilermakers to be brought to US on emergency basis should be sent directly to the National Office for processing.

